UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- GUOQING CAO and SHUYU LI, Defendants.	CAUSE NO. 1:13-cr-00150-WTL-TAB Indianapolis, Indiana May 19, 2014 10:00 a.m.

BEFORE THE
HONORABLE WILLIAM T. LAWRENCE

OFFICIAL REPORTER'S TRANSCRIPT OF

HEARING ON DISCOVERY MOTIONS

Court Reporter: Cathy Easley Jones, RMR, FCRR
Official Court Reporter
46 East Ohio Street, Room 291
Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
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A P P E A R A N C E S

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(In open court)

THE COURT: Be seated, please.

We are on the record on 1:13-cr-150, United States of America versus Cao and Li. Good morning, everyone.

We are here today to talk about the continuing issues regarding discovery. What I would like to do is go through what I believe, in summary fashion, where we will be in regards to those discovery issues at the end of the day. I propose to go through them very -- quite frankly, in somewhat quick, summary fashion. I will have a formal entry on the docket by the close of business today.

We'll also talk about anything else you want to talk about, whether it's discovery or otherwise; and it is my fervent hope that we can agree upon a trial date this morning also. So hopefully, you have access to your calendars so we can double-check that.

Let me just ask before I start, are there any agreements that have come down the pike after the discovery issues were basically teed up?

MS. RIDGEWAY: Your Honor, I don't believe so. Those issues that were in agreement we have articulated. We've kind of referred to them as miscellaneous items. There are several requests that the defendants have made that the government is happy to oblige. Some of those are within these pleadings. Some of them are not; but the bigger, larger issues that were briefed for the Court, there's no resolution.

THE COURT: Very well.

Mr. Leibman?

MR. LEIBMAN: That's certainly accurate, Your Honor. We agree with that.

THE COURT: Let me kind of go through my laundry list here. If I've missed some or if we need further explanation, we can discuss that.

In regards to the bill of particulars and the chart that was previously exchanged, essentially, the defendants want the government to specifically delineate what is and I suppose by default what is not Lilly property.

I really think that the government has complied with that. So I'm essentially going to deny that request in regards to the bill of particulars, the updating of the chart.

E-mails, defendants are requesting e-mails going back to 2006. The government has allowed back to 2009, and I'm going to hold with the government's request. However, what I would like to do is get those exchanged going back to 2009. Then if the defendants feel that there are smoking guns, if you will, in regards to those, I would reconsider if there are specifics that the defendants can come up with that would convince me that those e-mails between 2006 and 2009 are relevant. I would at least reconsider that; but at this point, I think we'll stop at 2009.

Exit interview documents, I'm going to kind of leave that alone. I really think the government has turned over the relevant documents to the defendants with regards -- particularly in regards to Cao's exit interview. I think the checklist is probably all we're going to get out of the government, or at least it appears that way.

If there are additional items other than what has been turned over, Ms. Ridgeway, obviously, you will make sure that becomes available. But at this point, I think the government has complied.

Training, the so-called Red Book, I'm going to grant defendant's request into that. The issue is probably how will they get that; and if that has to happen through a subpoena to Lilly's, fine. But I think that's fair game. So I am going to allow that as being discoverable.

In regards to the documents relating to concealment, I am going to grant the request that the government turn over any documentary evidence related to the acts of concealment contained in the latest indictment.

Defendants have also asked for a pretrial notice of any other acts of concealment that the government will present that are not contained in the latest indictment. The government has said that it only plans to offer evidence of acts of concealment contained in that indictment. Therefore, I think that the 404(b) argument is somewhat of a nonissue.

To the extent that the government changes its mind and plans to present such evidence, then, of course, the government would be obligated to provide that notice.

Okay, Brady material, interesting points. In regards to communication between Lilly and the government, I'm going to deny that. In regards to grand jury information, I'm going to deny that also.

In regards to the protective order, defendants really want to eliminate the restrictions on the experts now that the trade secret charges have been abandoned. I'm going to deny that request. I still think it is relevant. I agree with the government that while the trade secret charges have indeed been abandoned, the confidential nature of the Lilly discovery material has not materially changed.

All right. That is my laundry list. What's left, Mr. Leibman? Mr. Hensel? Mr. Newman?

MR. LEIBMAN: Your Honor, I'm sorry. That's quite complete. The only thing that's left -- and it's something the government did not object to -- is the subpoena to Lilly. We included that in our memo because the rule -- Rule 17 by its terms does not seem to allow a party to designate a pretrial production date; and of course, pretrial production is essential in order to make use of the produced materials.

So we've asked for the Court's permission to serve Lilly's outside representative. They've agreed to accept service -- the outside counsel -- with a subpoena returnable we suggest 45 days. They can either move to quash in whole or in part or produce documents. We'll share the subpoena with the government. We'll share whatever we get from Lilly with the government as well so it's transparent.

THE COURT: I was remiss. I had it on my list and overlooked it. That is correct. I have no problem with that. I think the 45 days is appropriate also.

MR. LEIBMAN: Thank you.

THE COURT: Mr. Newman?

MR. NEWMAN: May it please the Court, I think the Court's recitation covers the ground very thoroughly and as to its breadth as well.

The only thing that I would mention, spinning off the topic that Mr. Leibman just talked about, is this issue of communications between Lilly or the possibility of communications between Lilly and the government. I think it's probable that similar requests will be made of Lilly in a third-party subpoena; and the question of whether -- if Lilly has such documents in its possession as a third party that may be germane to these issues, that that would be a different set of arguments and a different standard for another day.

I think there is sufficient indications here that this is a relevant issue, that there may indeed be communications of this type that go beyond what is routine and what would be considered normal debriefing of a victim witness in order to draft a speaking indictment; and I think that those arguments can rest for another day, but I just wanted to point that out, that we may be back here with the shoe on the other foot on that issue; and I would ask the Court, obviously, to keep an open mind about that sort of thing, as it always does. Thank you.

THE COURT: I will keep such an open mind. As you can well imagine, my resolutions today are as of today; and really, the purpose, as you can well imagine, is to let's get this thing going. So I assume we may indeed revisit some of these issues.

MR. NEWMAN: We appreciate that, Your Honor.

THE COURT: Ms. Ridgeway?

MS. RIDGEWAY: Your Honor, the only thing the government would request is after the Court sets the trial date, if we could indulge the Court to allow the parties to try and draft another case management order similar to what the government had requested originally and maybe work backwards from that trial date.

THE COURT: I think that's probably appropriate, just to kind of keep everybody on a particular road map towards resolution. I think that's probably a good idea.

So let's talk now about a trial date. I think Mrs. Ong has communicated to counsel a date in October that I think Ms. Ridgeway has kind of okayed, but I don't think the defendants have responded.

Mrs. Ong, when was that?

COURT CLERK: October 6th was the date Ms. Ridgeway had proposed.

MR. LEIBMAN: May I approach and speak to that, Judge?

THE COURT: You may.

MR. LEIBMAN: No one's more anxious to get a resolution to this matter than the defendants, Your Honor, whether that resolution comes on a motion to dismiss or comes at trial; but -- and I understand the significance in any criminal case of setting a trial date. It keeps the parties moving and creates actual progress, not just the appearance of progress; but I think we should all be realistic about the date, and I think October is not a realistic date. Here's why.

If we serve Lilly with a subpoena tomorrow or Wednesday, that 45-day period -- and I don't think, in fairness to Lilly, that should be shortened substantially. It will be a significant subpoena. They should have a right to make a motion to quash, if they choose to do that. We don't want to trample on their rights as a third-party respondent. That 45 days will carry us until late June, early July, I guess, at this stage.

Assuming there's a motion, the Court will want to have a hearing; presumably will allow the defendants to respond to any motion. So I think we're in July before that big discovery issue is addressed.

Even with the government's existing discovery obligations, with e-mails going back to 2009 at a minimum, according to Your Honor's ruling, we expect that's going to take some time. The government has -- without criticizing their good faith, has been somewhat slow in generating these. Every e-mail has to be reviewed by Lilly counsel. We have to wait for privilege logs. There's a back and forth about the privilege log, that sort of thing. There are things to be done now and things to be done with a third-party subpoena that will consume some time.

Once we have all that discovery and can digest it, it may inform the substantive motions that we want to file. To be perfectly candid, Your Honor, we already have a very good idea about some of the motions that need to be filed to dismiss this what we think is a completely deficient wire fraud indictment; but some others are in flux, depending on what we find in discovery.

So realistically, Judge, I would think we would need the summer to receive that discovery, have Your Honor rule on any motion to quash, cajole the government into completing its somewhat slow-moving, slow rollout of certain discovery items.

Realistically, I think we're talking then about a September, maybe early September filing date or mid-September filing date; and given the government's response time, perhaps reply -- I hope we have a reply opportunity -- I think we're well in October before the Court can have a full and fully informed hearing on what will be some very significant motions, motions of constitutional import in some respects, I hope interesting for the Court but certainly very substantial.

So an October trial date I think is, frankly, not a realistic one. I think if Your Honor -- I haven't talked to co-counsel; but I think if Your Honor had in mind something later in the year to allow those motions to be heard and if the case survives, to then perhaps have a final pretrial conference. Allow for in limine motions. The government has indicated in the brief filed for today that it plans to file in limine motions. I think there needs to be an orderly interval -- at least I would suggest there needs to be one -- between the dispositive motions decision and the trial.

So for all of those reasons -- and I know I'm not offering Your Honor a very practical specific date -- it seems to me October is early. I don't know how co-counsel feels about that.

THE COURT: Mr. Newman, do you want to chime in on that?

MR. NEWMAN: For all of the reasons recited by Alan, I would feel more comfortable with -- if we're doing a full case management order with a deadline for dispositive motions around October 6th -- and following that, of course, motions in limine would come later probably once the issues were more defined, if we go on beyond the motion to dismiss the dispositive motions.

So I do think it's much more realistic, knowing what's coming in terms of motions to dismiss and the things that need to be received and the litigation that may happen or that Lilly would have a right to assert, as to the third party subpoena, with all of that, I think we would have to go through October or the beginning of October to get their -- to be ready to have a trial date.

I would think much more realistically around the first of the year, right after the holidays. I would feel that we could get that done and be able to stick to it.

Some courts, of course, like to set a date and knowing that it may not be real. I doubt that this Court is one of those that likes to have a moveable trial date just to keep folks focused. I think everybody here is working hard, including the government, to accommodate; but these are very complex issues, and they have simply taken time; and we have a very substantial third party here that has yet really to be heard from of its own right, and it may choose to do so.

So with that, I think we would endorse Mr. Leibman's motion of a timetable that's appropriate.

THE COURT: Thank you, Mr. Newman.

Ms. Ridgeway?

MS. RIDGEWAY: Thank you, Your Honor. The only thing I would say is this. If the defendants know what dispositive motions they plan to file, which is what was indicated to the Court just now, we would request that they file them now. If there are constitutional challenges to the indictment and the four corners of the indictment, discovery does not play on those issues. So those are issues that could be resolved in these next five months.

However, if the Court is inclined to move the trial date or to set it sometime later than October, we would respectfully request that it be set at least in December and before the new year.

There is one individual that I hope will be in a position to help me try this case, to be honest. The Court may know that the government's -- that the U.S. Attorney's Office at this point is severely understaffed. We're trying to hire people.

We have one person from the Department of Justice computer crimes intellectual property section that I hope will be free to try this case. If that were to happen, that individual would not be available in November. He would be available in December. I don't know what his calendar would be in 2015, but we would ask that the Court either set the matter in October or in the beginning of December.

THE COURT: How long have you requested --

MS. RIDGEWAY: Three weeks.

THE COURT: Is that still realistic?

MR. LEIBMAN: May I join Ms. Ridgeway at the podium?

THE COURT: Sure.

MR. LEIBMAN: Our estimate of three weeks, Judge, was based on having a more specific and narrow understanding of what the indictment says our clients took improperly, that is, the specific Lilly property. So we had imagined, of course, obtaining experts to speak to the non-Lilly ownership of various items that they were claiming ownership of.

We don't have that now. Your Honor has denied those particulars that we've asked for. So I think we have to think through how we would propose to defend against hundreds of pages of e-mail attachments with no -- with the government giving us no differentiation.

A long way of saying that we thought three weeks was a reasonable estimate at an earlier point. I think that's probably still close, but I'm less confident that I can pinpoint that.

Mr. Newman?

MR. NEWMAN: I would place it closer to four weeks based on Mr. Leibman's considerations as well as some others.

I think it's fair to say that given the denial of our motion for a bill of particulars, that one motion we will have relates to overbreadth, and I don't know that -- I mean, I think the rules and the rules of the Court provide for what our deadlines are to file various motions. Having the government insist that we file them today because some of them are on their face and some of them are amplified by discovery materials is not the way it works, as I understand it. As long as we're timely and our motions are apposite, that's the way the scheduling works.

I think it's fair to say after the bill of particulars issue, we're in a way -- I think raises a stronger issue as to overbreadth and vagueness; and that's, I think, one we can confidently predict if that helps the Court in any way. But we know the rules of procedure and the local rules. We intend to follow them, of course, to the tee.

THE COURT: Any response to that?

MS. RIDGEWAY: No.

THE COURT: I tend to agree that October may be a little bit optimistic. I too want this matter resolved in a timely fashion. I can't imagine either a three- or four-week trial going in December for any number of reasons. If November is definitely out as far as the government, I think then we're into the first of the year.

So Mrs. Ong, what do we have available?

COURT CLERK: We could begin January 5th and go for four weeks.

THE COURT: Is that a Monday?

COURT CLERK: It is. Martin Luther King falls on the 14th, so we would be dark that day.

THE COURT: Let's look at beginning on January the 6th. I know how Mr. Hensel likes to celebrate the new year, so I want to give him proper recovery time.

MR. HENSEL: Thank you, Your Honor.

THE COURT: All right. Is that livable at this point?

MS. RIDGEWAY: Yes, Your Honor, thank you.

MR. LEIBMAN: Yes.

MR. NEWMAN: Yes.

THE COURT: Hopefully, with that much notice, Ms. Ridgeway, your co-counsel might be able to make some arrangements.

What else can we do for the good of the cause, government?

MS. RIDGEWAY: Nothing from the government, Your Honor. Thank you.

MR. LEIBMAN: Nothing from defendant Cao. Thank you, Your Honor.

MR. NEWMAN: Nothing from Mr. Li.

THE COURT: Very well. Thank you all. Have a good day.

COURT CLERK: Please rise.

Court stands adjourned.

(The proceedings were adjourned at 10:27 a.m.)

CERTIFICATE OF COURT REPORTER

I, Cathy Jones, hereby certify that the foregoing is a true and correct transcript from reported proceedings in the above-entitled matter.

/s/ Cathy Jones May 29, 2014

CATHY JONES, RMR, RDR, FCRR
Official Court Reporter
Southern District of Indiana
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